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No. 90-1106

FILED
MAR 21 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MIKE DEGEURIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may consider events occurring after the district court's ruling in determining whether a grand jury subpoena should be quashed on the ground that it is unreasonable or oppressive.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 20a-46a, is reported at 913 F.2d 1118. The opinion of the district court, Pet. App. 1a-19a, is reported at 724 F. Supp. 458.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1990. A petition for rehearing was denied on October 11, 1990. Pet. App. 47a. The petition for a writ of certiorari was filed on January 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On the evening of September 18, 1989, federal and local drug enforcement agents executed a warrant to search a house in Houston, Texas. The agents seized

approximately 160 kilograms of cocaine from the house and arrested Jose Reyes-Requena at the scene. Reyes-Requena was found in a sleeping bag on the living room floor. A loaded revolver was found under the blankets covering the sleeping bag. Pet. App. 2a-3a, 22a.

Reyes-Requena told the agents that he had come from Matamoros, Mexico, two months before; that he was unemployed; that he had met an individual whom he called Chappa; and that Chappa had offered him the use of the house, food, and money if Reyes-Requena stayed there and safeguarded the house. Reyes-Requena refused to give a physical description of Chappa other than identifying him as an Hispanic male. Pet. App. 3a, 23a.

Four days later, on September 22, a magistrate conducted a preliminary hearing. At the hearing Reyes-Requena, despite his apparent indigence, was represented by petitioner, an experienced criminal lawyer in private practice. At the hearing, the magistrate concluded that the government had demonstrated probable cause to believe that Reyes-Requena had committed a criminal offense and bound him over for trial. Pet. App. 3a, 23a-24a.

Later that same day, a grand jury in the Southern District of Texas issued a subpoena to petitioner directing him to produce records regarding the fee arrangement he had made for representing Reyes-Requena. On September 28, petitioner filed a motion to quash the subpoena. In that motion and in a supplemental pleading, petitioner argued that the attorney-client privilege and the Sixth Amendment justified his refusal to disclose facts relating to the fee arrangement. Pet. App. 4a-5a, 24a-25a.

Following a hearing at which no testimony was presented, the district court granted the motion to

quash. Pet. App. 2a. The court gave three reasons for its ruling: the information sought by the subpoena was protected by the attorney-client privilege, the subpoena interfered with the Sixth Amendment right to counsel, and the timing of the subpoena made it "unreasonable or oppressive," Fed. R. Crim. P. 17(c), because petitioner's attention was being diverted from the preparation of his client's defense, thereby hindering his effectiveness. Pet. App. 8a-19a.

On appeal by the government, the court of appeals reversed. The court rejected petitioner's reliance upon the attorney-client privilege because he had not acknowledged the existence of a third-party benefactor, much less an attorney-client relationship with such an individual. Pet. App. 30a-31a. The court of appeals also found no Sixth Amendment violation, because there had been no infringement of Reyes-Requena's right to counsel and because the possibility of a conflict of interest was wholly speculative. Pet. App. 44a-45a. The court further noted that the subpoena was not unreasonable or oppressive, because events that transpired while the appeal was pending removed any oppressiveness. *Id.* at 43a. At the time the district court issued its order quashing the subpoena, Reyes-Requena had not yet been indicted, but the prosecution's investigation was moving swiftly. *Id.* at 41a. The district court found that issuance of the subpoena at that time was unreasonable or oppressive because it "created a serious interference with Reyes-Requena's relationship with his attorney" and because the government did not represent that it would be harmed by a brief delay in the issuance of the subpoena "until a lull in the Reyes-Requena prosecution or until after his conviction." *Ibid.* By the time the court of appeals ad-

dressed the case, however, Reyes-Requena had been indicted, prosecuted, and convicted; consequently, the time and effort that petitioner would expend on remand to deal with the subpoena was not likely to interfere with his handling of Reyes-Requena's defense. The court explained:

> Despite our general sympathy with the district court's decision to quash the DeGeurin subpoena when it was issued, new circumstances have arisen in the wake of Reyes-Requena's conviction. [Petitioner] cannot claim that his client's Sixth Amendment interest remains at the same high level as when the subpoena was originally quashed. * * * Although we could sustain the motion to quash based upon events as they stood nearly a year ago—leaving the government to issue a new subpoena to [petitioner] in the short time remaining until the grand jury's term expires—to do so would foster needless delay. Because this basis for the district court's action has vanished, it furnishes no support for a refusal to enforce the subpoena at this time.

Id. at 43a.

ARGUMENT

In this Court, petitioner focuses solely upon the court of appeals' rejection of his claim of unreasonableness or oppressiveness under Fed. R. Crim. P. 17(c). Petitioner maintains that the court of appeals should not have taken into account the events that occurred after the issuance of the order quashing the subpoena, because they were outside the record. Pet. 6.

The court of appeals properly took the changed circumstances into account—even though the changes occurred after the issuance of the order that the government appealed—and its decision does not conflict with any decision of this Court or any other court of appeals. Reyes-Requena's indictment, prosecution, and conviction were incontestable matters of official public record that could be judicially noted at the appellate level. *Massachusetts* v. *Westcott*, 431 U.S. 322, 323 n.2 (1977); *United States* v. *Cecil*, 836 F.2d 1431, 1449 n.8 (4th Cir.), cert. denied, 487 U.S. 1205 (1988); *United States* v. *Hawkins*, 566 F.2d 1006, 1008 n.2 (5th Cir.), cert. denied, 439 U.S. 848 (1978). The court of appeals properly considered the effect of those events upon the basis for the ruling challenged by the government. See *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 277 (1980). If appellate courts could not consider succeeding events that work a significant change in the circumstances that a district court confronted when it issued its ruling, they could not avoid review of issues that were no longer in controversy or that had become moot. Review of such issues is not a proper function of appellate courts under Article III. *United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 202-204 (1968); see *City of Los Angeles* v.

Lyons, 461 U.S. 95, 100-101 (1983); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Petitioner does not claim that the grand jury subpoena actually interfered with his ability to represent Reyes-Requena before, during, or after trial. Nor does he allege any facts that warrant the conclusion that the subpoena would presently have an unreasonable or oppressive effect. Instead, he makes the general argument that prosecutors should not be accorded unbridled use of a grand jury subpoena directed to a defense attorney that, if complied with, would disqualify the attorney from representing a client and would reveal privileged communications. Pet. 7. The short answer is that, as the court below observed, Pet. App. 44a-45a, petitioner has not been disqualified from representing anyone and the possibility of disqualification is dependent upon a series of wholly speculative events. In addition, the information sought by the grand jury, limited to the identity of a fee-payer and the amount paid, has long been held to be generally beyond the scope of the attorney-client privilege. *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 292-293 (1826); *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 670-671 & n.2 (5th Cir. 1975).

In any event, review of this case is inappropriate because the order below is interlocutory. The court of appeals remanded the case for further proceedings. On remand, the district court denied the government's motion to compel disclosure to the grand jury and declined to hold petitioner in contempt for refusing to make the disclosures sought by the grand jury. The government has taken a second appeal from that ruling. If the court of appeals sustains the district court, petitioner's contentions here will be moot. If the court of appeals reverses the dis-

trict court, further proceedings will occur in the district court. If petitioner is eventually held in contempt, he will be able to litigate the issue presented here on review of the contempt citation. *Cobbledick* v. *United States*, 309 U.S. 323 (1940). There is therefore no reason for this Court to examine petitioner's issue at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20446